U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0257 BLA

WILLIAM B. LEGG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 03/09/2017
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Paul E. Frampton and Michael J. Schessler (Bowles Rice LLP), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05543) of Administrative Law Judge Scott R. Morris, rendered on a subsequent claim filed on November 22, 2010,[1] pursuant to the provisions of the Black Lung Benefits Act, as

[1] Claimant filed an initial claim on August 20, 1997, which was denied by the district director on January 23, 1998, because claimant failed to establish any of the

amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established nineteen years of coal mine employment, with twelve years spent in underground mines and seven years working on the surface in conditions substantially similar to those in an underground mine. The administrative law judge also found that claimant suffers from a totally disabling respiratory or pulmonary impairment. Based on those determinations and the filing date of the claim, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.[2] The administrative law judge also found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Further, the administrative law judge determined that employer did not rebut the Section 411(c)(4) presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in weighing the medical opinions relevant to the issues of total disability and rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits.

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elements of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 3.

[2] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that at least "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's prior claim was denied for failure to establish any element of entitlement, the administrative law judge concluded that claimant satisfied the requirements of 20 C.F.R. §725.309(c), because evidence that was newly submitted with the subsequent claim established that claimant is totally disabled. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 21; Director's Exhibit 2.

The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption - Total Disability

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) the presence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concluding that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or more subsections, he or she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986).

In this case, the administrative law judge weighed the results of the newly submitted pulmonary function and arterial blood gas studies, obtained by Dr. Rasmussen on August 8, 2011, and by Dr. Zaldivar on November 30, 2011. Director's Exhibit 14; Employer's Exhibit 4. Because none of the pulmonary function or blood gas study

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[5] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibits 1, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

evidence was qualifying,[6] the administrative law judge determined that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 10. Furthermore, as there was no evidence in the record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that total disability was not established under 20 C.F.R. §718.204(b)(2)(iii). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted opinions of Drs. Rasmussen, Zaldivar, Rosenberg, and Houser. Dr. Rasmussen performed the examination on behalf of the Department of Labor on August 8, 2011. Director's Exhibit 14. Dr. Rasmussen reported that claimant's pulmonary function study showed a minimal restrictive respiratory impairment, with total lung capacity and residual volume minimally reduced. *Id*. He also reported that claimant had a normal blood gas study at rest, and that claimant was unable to undergo an exercise blood gas study because of hip pain and atrial fibrillation. *Id*. Dr. Rasmussen stated that claimant has "marked loss of lung function reflected by the reduced single breath diffusion capacity." *Id*. Dr. Rasmussen opined that, "[*b*]*ased on these resting studies*, [claimant] does not retain the pulmonary capacity to perform his regular coal mine employment." *Id*. (emphasis added).

Dr. Zaldivar examined claimant on November 30, 2011, and reported that the pulmonary function studies showed mild restriction of vital capacity, mild restriction of total lung capacity, and a moderate diffusion capacity impairment. Employer's Exhibit 4. Dr. Zaldivar obtained a normal resting blood gas study. *Id*. In addressing the issue of total disability, Dr. Zaldivar stated:

> From the pulmonary standpoint it is undetermined what degree of impairment [claimant] may have because exercise could not be done. . . . At present therefore I don't have any tangible evidence that [claimant] is not capable of performing his usual coal mining work from the pulmonary standpoint. The low diffusion in general may mean that there is a problem with oxygenation during exercise, but this does not occur invariably and therefore an exercise test would be needed in this case to ascertain whether any pulmonary impairment exists that would prevent him from performing his usual coal mine work. With the information at hand based on the spirometry and lung volumes plus a resting gas, my opinion is that there is

[6] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(i), (ii).

> no pulmonary impairment that would prevent him from performing his usual coal mining work.

Id.

Dr. Rosenberg reviewed medical records at the request of employer and prepared a report dated April 29, 2013. Employer's Exhibit 5. He opined that claimant is not totally disabled from a respiratory or pulmonary standpoint.[7] *Id*. Conversely, Dr. Houser reviewed medical records at the request of claimant and prepared a report on October 3, 2013. Claimant's Exhibit 4. He opined that the low diffusion capacity, as shown in the tests by Drs. Rasmussen and Zaldivar, would preclude claimant from performing his usual coal mine work. *Id*.

In weighing the conflicting medical opinions, the administrative law judge outlined the qualifications of each doctor and found that they "are well qualified to offer an opinion on whether [c]laimant is totally disabled due to a pulmonary impairment." Decision and Order at 16. The administrative law judge further found that Drs. Rasmussen, Zaldivar and Rosenberg demonstrated an "adequate understanding of [c]laimant's usual coal mine work" as a truck driver. *Id*. The administrative law judge considered Dr. Zaldivar's statements on total disability to be "equivocal" and he gave little weight to Dr. Rosenberg's opinion because Dr. Rosenberg relied primarily on "post-bronchodilation values" obtained by Dr. Zaldivar in concluding that claimant is not totally disabled. *Id*.

In contrast, the administrative law judge gave controlling weight to Dr. Rasmussen's opinion. Decision and Order at 17. Specifically, the administrative law judge found that Dr. Rasmussen "supported his opinion with the results of laboratory testing," and persuasively explained "why claimant's reduced single breath carbon monoxide diffusion capacity values outweighed [the] contrary evidence." *Id*. The administrative law judge further noted that Dr. Rasmussen's diagnosis of total disability was supported by Dr. Houser's opinion and Dr. Zaldivar's acknowledgement that claimant's diffusion capacity was "low." *Id*.

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Rasmussen and Houser because they diagnosed total disability based on the diffusion capacity measurement when "the applicable regulations do not use diffusing

[7] Dr. Rosenberg pointed out in his October 15, 2013 deposition that claimant's pulmonary function tests were "well above disability standards," particularly the testing obtained by Dr. Zaldivar, which showed "the FEV1 was "as high as" 2.25 and the FVC was "as high as" 3.12 (after use of bronchodilators). Employer's Exhibit 10 at 46-47.

capacity *alone* as a measure of disability." Employer's Brief at 12-13. Employer maintains that the use of the diffusion capacity test to establish total disability, without a corresponding exercise blood gas study, is irrational because the test can only speculate as to whether a miner may be disabled. Thus, employer advocates use of only the pulmonary function and arterial blood gas studies in determining whether the miner is totally disabled.

Contrary to employer's argument, the fact that claimant was unable to establish total respiratory disability based on the pulmonary function or blood gas study evidence does not preclude a finding of total respiratory disability based on a physician's opinion that relies on other objective testing. *See* 20 C.F.R. §718.204(b)(2)(iv). The applicable regulation states:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, *based on medically accepted clinical and laboratory diagnostic techniques*, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine] employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv) (emphasis added). Furthermore, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has specifically recognized that "a physician's opinion that a claimant is disabled due to a diffusing capacity abnormality may constitute a valid basis for an administrative law judge's finding of total disability under the Act." *Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir. 1991). Thus, we reject employer's argument that a diffusion capacity test is not a valid measure for determining total disability.

We also see no error in the administrative law judge's reliance on Dr. Rasmussen's opinion to find that claimant is totally disabled.[8] Dr. Rasmussen was

[8] In his initial report of August 8, 2011, Dr. Rasmussen wrote that claimant's diffusing capacity (DLCO) was "34" percent of predicted, which he categorized as "marked impairment." Director's Exhibit 14. However, the report of pulmonary function testing on August 8, 2011, signed by Dr. Rasmussen, lists the DLCO as "46" percent of predicted. *Id.* During his October 21, 2013 deposition, and in his March 12, 2014 supplemental report, Dr. Rasmussen referenced the DLCO as "44" percent of predicted. Claimant's Exhibits 5, 6. Although the administrative law judge did not discuss these discrepancies in the percentages listed by Dr. Rasmussen for the DLCO, we consider any error by the administrative law judge to be harmless, as Dr. Rasmussen

deposed on October 21, 2003. When asked to explain the meaning of claimant's marked reduction in diffusion capacity, Dr. Rasmussen stated:

> The diffusing capacity for carbon monoxide is a - - basically, it's a surrogate for the ability of the lung to transfer oxygen from the lung to the arterial blood. It is performed by having the individual inhale a mixture of gases, including carbon monoxide which is absorbable and other gases which are not. The patient inhales for a certain amount, holds his breath, and then exhales, and there are various -- it's a complicated calculation that results in a value. We currently use the Crapo standard. I think most people do, and it showed a value of 44 percent of the predicted value, so it's indicating that it's a marked loss of - a surrogate for a marked loss of impairment -- or of transferring gases during exercise and such a reduction is almost invariably associated with significant exercise hypoxia. *A level of that description is considered to be marked impairment by the American Thoracic Society, College of Chest Physicians, and other groups, so it's an indicator of marked impairment in lung function*.

Claimant's Exhibit 4 (emphasis added). In light of Dr. Rasmussen's testimony, we affirm the administrative law judge's finding that Dr. Rasmussen gave a reasoned diagnosis of total disability based on the diffusion capacity results in this case. *See Walker*, 927 F.2d at 184-85, 15 BLR at 2-23-24; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-258 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-129-30 (4th Cir. 2012). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion, as further supported by Dr. Houser's opinion, was sufficient to satisfy claimant's burden to

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specifically concluded that claimant was totally disabled, based not only on the August 8, 2011 diffusion capacity test, but also on the DLCO value obtained by Dr. Zaldivar, which was even lower, at 43 percent of predicted. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 29.

establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Furthermore, we affirm the administrative law judge's overall finding that claimant established total disability, taking into consideration all of the contrary probative evidence under 20 C.F.R. §718.204(b)(2). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987*); Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc); Decision and Order at 18. We therefore affirm the administrative law judge's determination that claimant established invocation of the Section 411(c)(4) presumption, and a change in applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309; Decision and Order at 18.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis[9] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-46 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer asserts that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. We disagree. The administrative law judge observed correctly that Dr. Zaldivar opined that claimant does not have legal pneumoconiosis because he attributed claimant's diffusion capacity impairment to pulmonary fibrosis caused solely by smoking and the aging process. The administrative law judge observed correctly, however, that the Department of Labor concluded in the preamble that the risks of smoking and coal dust exposure are additive. Decision and Order at 24 n.30; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Contrary to employer's contention, we see no error in the administrative law judge's rational finding that Dr. Zaldivar failed to adequately explain why claimant's nineteen years of coal mine employment coal dust exposure "did not exacerbate any impairment caused by smoking."

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Decision and Order at 24; *see Cochran*, 718 F.3d at 324, 25 BLR at 2-258; Employer's Exhibit 4. We also see no error in the administrative law judge's conclusion that Dr. Rosenberg gave equivocal testimony regarding whether coal mine dust exposure can cause diffuse interstitial fibrosis, the type of fibrosis Dr. Rosenberg described as being consistent with a low diffusion capacity measurement. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 24; Employer's Exhibit 10. The administrative law judge also rationally found that to the extent Dr. Rosenberg diagnosed a mild obstructive impairment but did not adequately discuss the etiology of that impairment, his opinion was insufficient to disprove the existence of legal pneumoconiosis.[10] *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 24; Employer's Exhibit 10. Consequently, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not suffer from pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *Bender*, 782 F.3d at 137, 25 BLR at 2-699; Decision and Order at 29.

Employer also asserts that the administrative law judge erred in finding that it did not rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge permissibly concluded that "since Drs. Zaldivar and Rosenberg did not provide reliable opinions as to the etiology of claimant's pulmonary impairment [legal pneumoconiosis] it follows that these physicians' opinions as to the etiology of [c]laimant's total pulmonary disability merit little probative value." Decision and Order at 30; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Thus, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis as defined at 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 31.

[10] Because employer bears the burden of proof to affirmatively establish that claimant does not have pneumoconiosis, it is not necessary that we address employer's arguments regarding the weight accorded the opinions of Drs. Rasmussen, Houser, and Durham, who diagnosed pneumoconiosis and whose opinions do not aid employer in establishing rebuttal under 20 C.F.R. §718.305(d)(1)(i). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge